Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CLARENCE WILLARD SPIVEY, JR., et ux.,
Petitioners,

v.

HAROLD S. COOK, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52pp

QUESTIONS PRESENTED

A. Does the absolute immunity provided to prosecutors extend to situations where the prosecutors provide pre-arrest advice to law enforcement officers on whether a particular activity constitutes violation of law and dictate what language to use in an affidavit seeking warrant of arrest when the prosecutors direct the officers to insert false or misleading information in the affidavit and know that no violation of law has been committed?

B. Can a court of appeals review facts found by the district court on appeal regarding the issue of prosecutorial absolute immunity and replace its findings of fact with those of the district court to justify a legal finding of absolute immunity on a motion for summary judgment claiming immunity?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Petitioners

Clarence Willard Spivey, Jr.
Karon K. Spivey
Clarence Willard Spivey, Jr. and Karon K. Spivey doing business as Thrifty Instant Print

Respondents

Harold S. Cook
Rickey Robertson
State of Louisiana
Thomas Yeager
Gerald Henderson
Charles Wagner

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The petition should be granted because the issue addresses prosecutorial absolute immunity, an important question of federal law, and the governing case law on this matter, Kalina v. Fletcher, appears misunderstood amongst the circuits as to how it applies to prosecutors' activities, investigating and providing legal advice regarding the existence of a crime or at least probable cause, beyond those addressed in Kalina. 7

The petition should be granted because misapplication of Kalina would leave no safeguard against malicious charges and prosecution in whereby the malicious tortfeasing prosecutor could, with his influence of legal knowledge, orchestrate false charges, arrests and prosecutions and remain absolutely immune, leaving the victim with no avenue for remedy, redress and, thus, leaving no protection against same. 10

The petition should be granted because the court of appeals departed from the accepted and usual course of proceedings by failing to accept the plaintiffs allegations as true and by replacing its findings of fact with those of the district court to reverse the district court and find that prosecutorial immunity applied which is in clear conflict with established procedural case law. 13

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IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioners, through undersigned counsel, respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at 197 F.3d 772, 1999 WL 1115447 (5th Cir.(La.)).

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Petitioners' case was December 7, 1999.

An out of time petition for rehearing was filed and was denied by the United States Court of Appeals on January 10, 2000, and a copy of the order denying rehearing appears at Appendix C to this petition.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in part:

> The right of the people to be secure in their persons ... against unreasonable ... seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation ....

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of ... liberty ... without due process of law.

Finally, this case involves Title 42 of the United States Code, Section 198, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a civil rights case brought under 42 U.S.C. § 1983 by Petitioners, Clarence Willard Spivey, Jr. and his wife, Karon K. Spivey against Respondents, Thomas Yeager, Gerald Henderson and Charles Wagner. Mr. and Mrs. Spivey's claim is that, by improperly investigating the alleged activities performed by the Spiveys, by advising Officers Cook and Robertson that Mr. Spivey had committed the crime of altering public records by copying driver's licenses, and by directing the officers to make false and misleading statements in an affidavit supporting a warrant for his arrest dictated by them, Mr. Yeager and Mr. Henderson (and thus Mr. Wagner is his official capacity as District Attorney) caused Mr. and Mrs. Spivey to be deprived of rights guaranteed by the Fourth and Fourteenth Amendments. Mr. Yeager, Mr. Henderson and Mr. Wagner claim that they are absolutely immune from suit for such conduct by virtue of their position as Assistant District Attorneys and as the District Attorney.

Petitioners own and operate Thrifty Instant Print, a small printing business in Alexandria, Louisiana. In addition to doing "press work" such as printing flyers, envelopes and business cards on their rubber ink based printing press, they also did photostatic copying on a toner based copier. Finally, in the last several years, they had been offering "color copies" on a copier that printed with four colors of toner, which provided copies which were arguably "picture perfect."

Throughout their twenty or more years in the printing business, customers had always requested copies of their driver's licenses for such things as job applications, hunting and fishing excursions, concealed weapon applications, etc. During the last couple of years, people had started requesting color copies because the image was much clearer and more

identifiable. In the Spring of 1996, young people started coming into their business to get copies of their licenses - each time claiming that the purpose was for employment applications, license applications, or, even in one instance, an explorer unit with the Louisiana State Troopers.

One day two Louisiana Public Safety and Corrections Officers, Defendants, Mr. Cook and Mr. Robertson came into the Spiveys' business, asked many questions about the color copier and its capabilities and informed Mr. and Mrs. Spivey that making color copies of Louisiana Driver's Licenses was illegal, directing them to cease and desist. The officers had been investigating the use of altered driver's licenses by local minors to enter drinking establishments underage. At least five minors claimed to have made a color copy of their licenses in Thrifty Instant Print before having gone home to alter and laminate their licenses for such purpose.

After their visit to the Spiveys' print shop, Officers Cook and Robertson visited the District Attorney's office to obtain advice on whether a person could be held liable for making copies of drivers' licenses that are then altered at another location by the minor to make a minor appear to be of the legal drinking age. After three or four Assistant District Attorneys had discussed the matter, two of whom left the meeting without finding that a violation had occurred, Mr. Yeager, who was running for the office of district judge on or about that time, told the officers with what crimes Spivey could be charged and instructed the officers to prepare for submission an affidavit of probable cause for an arrest warrant for Spivey using the term "counterfeited" and the phrase that "Spivey had altered the license." Deposition testimony of Officer Robertson demonstrates that the Assistant District Attorneys suggested pursuing the source of the fake IDs, and that it was their suggestion to obtain an arrest warrant for

Spivey, including supplying the legal basis for such an arrest. See Appendix B. Officer Robertson typed up the warrant as dictated by Respondent Thomas Yeager, the judge issued the arrest warrant, and charges were brought against Spivey.

State Police arrested Mr. Spivey, escorting him in handcuffs through the front door of his business into the arms of an alerted media. He was charged with five counts of injuring public records and one count of unlawful use of a license. Shortly thereafter, however, the District Attorney's office dropped all charges against him, the prosecuting district attorney stating that there was "not a shred" of evidence to support the charges.

The Spiveys then filed suit in the Ninth Judicial District Court, Parish of Rapides, against the officers. The suit was removed to the United States District Court for the Western District of Louisiana. Based on deposition testimony in that case, Spivey amended his complaint to include the Assistant District Attorneys on the ground that they "prepared an embellished and false affidavit for [the police officers] to type and prepare and to submit to the District Judge to obtain a warrant of arrest."

Subsequently, the defendants brought a 12(b)(6) motion, or in the alternative, a motion for summary judgment pursuant to Fed.R.Civ.P. 56, asserting their entitlement to absolute, or in the alternative, qualified immunity. The district court denied the motions.

The United States Court of Appeals for the Fifth Circuit reversed and rendered, dismissing Petitioners' suit on the grounds of absolute immunity, not because the court of appeals disagreed with the legal conclusion of the district court, but rather because the court of appeals disagreed with

the district court's factual finding. Petitioners sought rehearing and were denied. In response, Petitioners hereby make this application for writ of certiorari.

REASONS FOR GRANTING THE PETITION

The petition should be granted because the issue addresses prosecutorial absolute immunity, an important question of federal law, and the governing case law on this matter, Kalina v. Fletcher, appears misunderstood amongst the circuits as to how it applies to prosecutors' activities, investigating and providing legal advice regarding the existence of a crime or at least probable cause, beyond those addressed in Kalina.

In Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502 (1997), the Court granted certiorari to resolve the conflict amongst the circuits regarding the question whether a prosecutor may be held liable for conduct in obtaining an arrest warrant. Unfortunately, Kalina's facts limited its use in assisting the circuits in determining whether a prosecutor may be held liable when they actually swear the oath or verification. That is, the circuits are unsure and conflicted on whether prosecutorial absolute immunity applies when, in response to a query by police officers, the prosecutor investigates the offered facts and advises the officers on whether the facts of the case show probable cause that a violation of law has occurred.

In the matter respectfully being brought before the Court, the district court and the court of appeals disagreed whether the assistant district attorneys enjoyed absolute immunity when they advised the officers who sought their advice whether Petitioners' conduct was a violation of Louisiana law. Despite evidence to the contrary, Respondents advised the officers that Petitioner's conduct in copying driver's licenses was a violation of Louisiana law, specifically Mr. Spivey was charged with Injuring Public Records by copying and altering them. The officers testified in their depositions that after Mr. Yeager and Mr. Henderson decided that a crime had been committed, they dictated the exact language for Mr. Cook and Mr. Robertson to type into the affidavit and motion seeking Mr. Spivey's arrest.

Subsequently, unlike the facts in Kalina, the officers brought the motion and affidavit to the judicial district judge, themselves, without the assistance of the prosecutor advocates. Further, Mr. Yeager and Mr. Henderson dictated an affidavit which included the embellished phrases that Mr. Spivey had "counterfeited" the licenses and that he had "altered the licenses," when both the officers and the prosecutors knew the allegations to be false and misleading.

Using Kalina, the district judge found that Respondents were not entitled to absolute immunity because they had manufactured evidence for the police to place in an affidavit for probable cause. The court of appeals, on the other hand, found that the prosecutors were not creating or manufacturing new facts for the police officers to include in an affidavit for an arrest warrant, but suggesting legal conclusions on the facts already given to them by the police and that under Kalina, a prosecutor acts as an advocate in supplying legal advice to support an affidavit for an arrest warrant and is entitled to absolute immunity as long as a

prosecutor does not personally attest to the truth of the evidence presented to a judicial officer, or exercise judgment going to the truth or falsity of evidence.

Accordingly, the court of appeals found that because the prosecutors were acting as advocates in supplying legal advice based on facts provided by police officers to support an affidavit for an arrest warrant, the prosecutors in the instant case are absolutely immune. Spivey v. Cook, 197 F.3d 772, 776 (5th Circuit 1999).

In the Sixth Circuit a similar issue arose in Prince v. Hicks, 198 F.3d 607 (6th Cir. 1999), wherein an arrestee, wife of a former chancellor who publically spoke out against the District Attorney, was arrested and detained under charges of kidnaping her infant grandson. When charges were dropped, Mrs. Prince brought a Section 1983 action against the state prosecutor and others.

In her claims against the state prosecutor, Mrs. Hicks, Mrs. Prince alleged that Mrs. Hicks violated her constitutional rights when she undertook to perform an investigation of the facts prior to advising the officers. Mrs. Prince also alleged that Mrs. Hicks violated her constitutional rights when she provided advice to the officers that there was probable cause for a warrant to issue, and that the officer in response executed the warrant in reliance on that advice.

The court of appeals looked to Kalina, as well as previous Supreme Court cases on the issue and found that Mrs. Hicks was not entitled to absolute immunity because the allegation referred to conduct which occurred while Mrs. Hicks was, in the eyes of the Sixth Circuit, performing administrative and investigative functions that were not intimately associated with the judicial phase of the criminal

proceedings, when she undertook to perform an investigation. Further the court of appeals found that Mrs. Hicks was not entitled to absolute immunity when she provided advice that there was probable cause for the warrant to issue, when the officer relied on that advice to execute the warrant, relying heavily on Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

Thus on essentially the same tasks of the law enforcement officers providing facts to the prosecutor, asking the prosecutor's advice on whether a person could be charged with a crime; the prosecutors investigation of the facts; and the advice that sufficient probable cause existed to charge the person with the crime were evaluated two different ways by the Fifth Circuit and the Sixth Circuit. The circuits are confused, requiring the Court's supervisory attention. Thus, it is respectfully submitted that the Court should grant writ of certiorari.

The petition should be granted because misapplication of Kalina would leave no safeguard against malicious charges and prosecution in whereby the malicious tortfeasing prosecutor could, with his influence of legal knowledge, orchestrate false charges, arrests and prosecutions and remain absolutely immune, leaving the victim with no avenue for remedy, redress and, thus, leaving no protection against same.

As suggested above, the Court provided the circuits with Kalina to resolve the conflict amongst the circuits regarding the question whether a prosecutor may be held

liable for conduct in obtaining an arrest warrant and Kalina's facts limited its use in assisting the circuits in determining whether a prosecutor may be held liable when he or she actually swears to a requisite oath or verification. While establishing a line to assist the circuits in conceptually seeing the donning and doffing of the cloak of absolute immunity, it does not assist in limiting prosecutorial misconduct. In the case sub judice, it is alleged that Mr. Yeager and Mr. Henderson knew that they were falsely accusing an innocent man, but they chose to do so for personal motives, including publicity and near future political endeavors. In Prince v. Hicks, it was alleged that Mrs. Hicks was surreptitiously punishing Mrs. Prince and her husband for their public criticism of the District Attorney General's work and for publically supporting the opposition candidates. Finally, to round out the example, in the Seventh Circuit, in Meteunas v. Piland, 182 F.3d 922 (7th Cir. 1999), it was alleged that Mr. Piland, the county's state's attorney, knowingly and recklessly filed a criminal information charging Mr. Meteunas with aggravated stalking when the police officer concluded that the evidence, an audio tape of a phone conversation, did not contain a threat of bodily harm. After serving three hundred sixteen days in jail, Mr. Meteunas withdrew his guilty plea and the stalking charge was dismissed.

In Spivey v. Cook and Meteunas v. Piland, the court of appeals relied on Kalina to find that the prosecutors were immune regardless of proof of malicious intent.

As the Court is well aware, the complaining witness is normally the focus of the victim's civil redress. But when the complaining witness is advised by the prosecutor, even when the advice leads to initiation of criminal prosecution, then the complaining witness can alleviate the weight of being a malicious tortfeasor by claiming that they, the complaining

witnesses, were simply doing what the prosecutor told them to do.

Can the employment as a community's prosecutor give carte blanche to a bad actor to instigate charges against his enemies? This possibility is further heightened in those communities, such as Champaign County, Illinois where Mr. Piland could initiate information and charges without a complaining witness.

Obviously, Petitioners do not know whether Mrs. Hicks or Mr. Piland had any malicious intent, but in the case before this court, Petitioners are not being given the opportunity to even discover whether it could be proven that Mr. Yeager and Mr. Henderson had malicious intent (although the succinct possibility was recognized and addressed by the district court). See Appendix A. Such is the result of prosecutorial absolute immunity when the Section 1983 claim is dismissed on a motion for summary judgment on that basis.

Thus, the chests of the citizens of the United States are left exposed with no real protection against a bad actor, who just so happens to get hired or elected to a prosecutor's position, while the bad actor gains the crest and armor of absolute immunity. The fact remains that, although not claimed as the malicious intent in this suit, prejudicial discriminatory beliefs, including racism, are still in existence throughout the United States. Yet, the prosecutor, under the authority of Kalina, can with his influence artfully frame and construct situations where he can ensure that the next victim of his malicious intent feels the strength and power of his office, free and clear of any liability.

This in light of the very purposes of the Civil Rights Act, to protect the citizens from bad actors acting under color of state law, is unacceptable. Any common-law traditions or case law to the contrary flies in the face of the foundations of the Constitution and should be struck down as unconstitutional. It is far better that one prosecutor take time to reflect whether he is advising an officer that probable cause exists when it does not, rather than innocent men and women being arrested, thrown in jail, and smeared throughout the media, until which time as one can finally clear one's name and prove one's innocence. Accordingly, it is respectfully submitted that the Court should grant writ of certiorari to remedy this situation.

The petition should be granted because the court of appeals departed from the accepted and usual course of proceedings by failing to accept the plaintiffs allegations as true and by replacing its findings of fact with those of the district court to reverse the district court and find that prosecutorial immunity applied which is in clear conflict with established procedural case law.

In addition to the conflicting issue of whether the prosecutors' acts were absolutely immune by virtue of their function in light of Kalina, this case also had gross errors of procedural review. While the court of appeal accurately summarized the law regarding review in the introduction to its opinion, the court failed to heed its own summary.

Under the title Standard of Review, the court of appeal provided, "We accept a plaintiff's factual allegations as true when considering motions to dismiss under FedR.Civ.P. 12(b)(6)." Spivey v. Cook, 197 F.3d 772, 774. However, in

the conclusion of the opinion, the court of appeals specifically rejects one of Petitioner's factual allegations. As the court showed in its Factual and Procedural Background section, "Spivey amended his complaint to include the Assistant District Attorney on the ground that they 'prepared an embellished and false affidavit for [the police officers] to type and prepare and to submit to the District Judge to obtain a warrant of arrest.'" Id. Yet, the court concluded, "[t]he prosecutors were not creating or manufacturing new facts for the police officers to include in an affidavit for an arrest warrant, but suggesting legal conclusions on the facts already given to them by the police." Id at 776. Thus, the court of appeals departed from the accepted and usual course of proceedings by failing to accept a Petitioners' factual allegations as true when considering this motion to dismiss.

The court further provided in its Standard of Review, "[t]his court will not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts . . . and will construe all factual allegations in the light most favorable to the plaintiffs." Id at 774. Yet, the court provided as follows: "However, the facts do not support a finding of manufactured evidence, but instead a reasonable inference that an individual repeatedly photocopying other persons' licenses for the same small set of individuals, and selling them laminating paper, might know of the ultimate use and thus be charged as a principal in falsifying public records." In this phrase the court has not only deviated from the face of the pleadings, and certainly not construed the factual allegations in the light most favorable to plaintiffs, but it has supplanted new facts by misconstruing the testimony of one of the officers. Indeed, the statement of material facts offered by Respondents in support of their motion for summary judgment never said such nonsense. Rather it was information first provided by Respondents in their appellate

brief; a fact which led Petitioners to file a Motion to Strike and a Motion for Sanctions in the court of appeal. Both the Motion to Strike and the Motion for Sanctions were carried with the case and summarily dismissed in the last paragraph of the court of appeals' opinion: "The two pending motions that were carried with the case are hereby denied." Id at 776. An example of the misconstruction of the factual allegation in a light favorable to the defendants was the fact that the statement regarding laminating paper which is found in the testimony of one of the children was that he copied his license at Thrifty Instant Print and then bought some laminating paper. One construction could be that he bought the paper at Thrifty Instant Print, but the other construction - the truth of the matter - is that he bought it elsewhere because Petitioners had a laminating machine, not laminating paper. Thus, the court of appeals departed from the accepted and usual course of proceedings by looking beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts and by failing to construe all factual allegations in the light most favorable to the plaintiffs when considering this motions to dismiss.

Next, the court in its Standard of Review provided, "[w]e will grant a motion for summary judgment under Fed.R.Civ.P. 56 only if the pleadings, answers to interrogatories, admissions and affidavits on file indicate no genuine issue as to any material fact." Again, as noted in the previous paragraph, the court of appeal turned its decision on the finding that there is a reasonable inference that an individual repeatedly photocopying other persons' licenses for the same small set of individuals, and selling them laminating paper, might know of the ultimate use and thus be charged as a principal in falsifying public records. Yet, this inference demands acceptance of the facts that the individual was repeatedly photocopying other persons' licenses for the same

small set of individuals and selling them laminating paper. As also shown above, these were not material facts to which there were no genuine issues. Petitioners have never and will never agree that they repeatedly photocopied other persons' licenses for the same small set of individuals and will never agree that they sold any individual laminating paper since the early 1980s. Thus, there were genuine issues of the facts that the court of appeal established as being material and the court departed from the accepted and usual course of proceedings granting the motion for summary judgment in light of these disagreements in the record (and in the Motion to Strike).

Finally, as argued in Respondents' Petition for Rehearing the court of appeal overlooked its jurisdiction over this case and the parameters established in reviewing interlocutory appeals on the issue of immunity. As the Court is well aware, under the collateral order doctrine, interlocutory appeals from district court orders, denying summary judgment on the basis of absolute or qualified immunity may be appealed, assuming these orders are based on issues of law. Hart v. O'Brien, 127 F.3d 424, 435 (5th Cir. 1997) citing Mitchell, 472 U.S. at 526. In so doing, the denials of motions for summary judgment on the grounds of qualified or absolute immunity are subject to de novo review; however, the review is limited to disputed issues of material fact whether uncontested conduct violated clearly established law. Hart at 435-36. Thus, an appellate court "cannot review whether the evidence could support a finding that particular conduct occurred, but can take, as given, the facts that the district court assumed when it denied summary judgment and determine whether those facts state a claim under clearly established law." Meyer v. Austin Ind School Dist 161 F.3d 271, 275 (5th Cir. 1998) quoting Southard v. Texas Bd of Criminal Justice 114 F.3d 539, 548 (5th Cir. 1997) (internal quotation marks and citations omitted). This

is true, the courts have found, because to do otherwise would be to review for sufficiency whether the evidence could support a finding that particular conduct occurred, which is an issue "not truly 'separable' from the plaintiffs' claim," leaving no "final decision" under Mitchell, and thus precluding the basis of the courts of appeals' jurisdiction. Hart, 127 F.3d at 436 quoting Behrens v. Pelletier, 516 U.S. 299, ____, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996). Accordingly, when the court of appeals provided: "[w]e must disagree, however, with the district court's factual conclusion," whereby the Court reviewed the district court's fact-finding regarding the movants' conduct, the court overlooked its jurisdictional parameters that it must "take, as given, the facts that the district court assumed when it denied summary judgment and determine whether those facts state a claim under clearly established law." Meyer, 161 F.3d at 274. Thus, the court of appeals departed from the accepted and usual course of proceedings by going beyond its jurisdictional authority when reviewing this interlocutory appeal.

For the foregoing reasons of departure from the accepted and usual course of proceedings it is respectfully submitted that the Court should grant writ of certiorari.

CONCLUSION

Rule 10 of the Supreme Court Rules provides the potential petitioner with examples of situations which would justify the Court to exercise its judicial discretion. One example is when a court of appeals has rendered a decision in conflict with the decision of another court of appeals. Another example is when a court of appeals has decided an important question of federal law which has not been settled

by the Court. A third example is when a court of appeal has so far departed from the accepted and usual course of judicial proceedings as to call for the Court's power of supervision. These are the situations in this matter.

This petition shows that the circuits are presently confused on how to apply absolute immunity to situations where a prosecutor is contacted by an officer to determine whether a person has committed a crime given a certain set of facts. This is the point where Burns and Kalina collide. This confusion is found in this case and the Sixth Circuit's opinion in Prince v. Hicks.

This petition also shows that, probably largely because of the confusion, Kalina has now exposed the people of the United States to offenses and affronts by potentially bad prosecutors without affording them at least civil remedy to limit these bad acts. This is certainly an important question of federal law, both from the perspective of Section 1983 and the purposes of the Civil Rights Act and also from the perspective of serious public policy considerations. Although the issue was once settled, relying upon the Burns guidance of immunity commencing with initiation of the charges and arrest, Kalina now expands prosecutorial absolute immunity to arguably limitless bounds when manipulated by a conniving bad actor holding the position of prosecutor.

Finally, this petition shows that the court of appeals did not apply the correct reviewing standard to this case, departing from the accepted and usual course of proceedings.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: April 10, 2000.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-30595

[Filed December 7, 1999]

Clarence Willard Spivey, Jr., doing business as Thrifty Instant Print; Karon K. Spivey, doing business as Thrifty Instant Print,	)
Plaintiffs-Appellees,	)
v.	)
Rickey Robertson, individually and in his official capacity as a police officer for the State of Louisiana; et al,	)
Defendants,	)
Charles F. Wagner; Thomas Yeager; Jerry Henderson,	)
Defendants-Appellants.	)

Appeal from the United States District Court
for the Western District of Louisiana

December 7, 1999

Before REYNALDO G. GARZA, JOLLY, and, DeMOSS, Circuit Judges. REYNALDO G. GARZA, Circuit Judge:

I. Factual and Procedural Background

Mr. Spivey owns and operates Thrifty Instant Print, a photocopy business in Alexandria, Louisiana. In his capacity as the operator of the print shop, he photocopied hundreds of driver's licenses belonging to minors who subsequently altered their original licenses with the Spivey photocopy so as to allow them to appear of legal age to purchase and consume alcohol or secure admission to night clubs that served alcoholic beverages.

As part of a crackdown on underage drinking and the use of fake IDs, the police visited the Spivey shop after concluding that he was the exclusive source of the photocopies. Spivey freely cooperated with police, even demonstrating his photocopier on a license. At this point in time, Spivey was not a criminal target.

After this visit, upon urging of their superiors, Officers Cook and Robertson visited the District Attorney's office to obtain advice on whether a person could be held liable for making copies of drivers' licenses that are then altered to make a minor appear to be of the legal drinking age. Following a review of the law, the Assistant District Attorneys told the officers with what crimes Spivey could be charged and instructed the officers to prepare for submission an affidavit of probable cause for an arrest warrant for Spivey using the term "counterfeited." Deposition testimony of

Officer Robertson demonstrates that the Assistant District Attorneys suggested pursuing the source of the fake IDs, and that it was their suggestion to obtain an arrest warrant for Spivey, including supplying the legal basis for such an arrest. Officer Robertson typed up the warrant as suggested, the judge issued the arrest warrant, and charges were brought against Spivey.

State Police arrested Mr. Spivey, escorting him in handcuffs through the front door of his business into the arms of an alerted media. He was charged with five counts of injuring public records and one count of unlawful use of a license. Shortly thereafter, however, the District Attorney's office dropped all charges against him, the prosecuting district attorney stating that there was "not a shred" of evidence to support the charges. The Spiveys then filed suit in the Ninth Judicial District Court, Parish of Rapides, against the officers. The suit was removed to the United States District Court for the Western District of Louisiana. Based on deposition testimony in that case, Spivey amended his complaint to include the Assistant District Attorneys on the ground that they "prepared an embellished and false affidavit for [the police officers] to type and prepare and to submit to the District Judge to obtain a warrant of arrest."

Subsequently, the defendants brought a 12(b)(6) motion, or in the alternative, a motion for summary judgment pursuant to Fed.R.Civ.P. 56, asserting their entitlement to absolute, or in the alternative, qualified immunity. The district court denied the motions. This appeal followed.

II. Standard of Review

We accept a plaintiff's factual allegations as true when considering motions to dismiss under Fed.R.Civ.P. 12(b)(6). *Buckley v. Fitzsimmons*, 509 U.S. 259, 261, 113 S.Ct. 2606, 2609 (1993); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Unless such allegations show that the plaintiff has failed to state a claim upon which relief can be granted, this court will not grant a motion to dismiss under 12(b)(6). *Id.* This court will not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts, *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992), and will construe all factual allegations in the light most favorable to the plaintiffs, *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994).

We review *de novo* the denial of motions for summary judgment on the grounds of qualified or absolute immunity. *Hart v. O'Brian*, 127 F.3d 424, 437 (5th Cir. 1997). We will grant a motion for summary judgment under Fed.R.Civ.P. 56 only if the pleadings, answers to interrogatories, admissions and affidavits on file indicate no genuine issues as to any material fact. Fed.R.Civ.P. 56. When the burden at trial rests on the nonmovant, the movant must merely demonstrate an absence of evidentiary support in the record for the nonmovant's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Courts of Appeals consider the evidence in the light most favorable to the nonmovant, yet the nonmovant may not rely on mere allegations in the pleadings; rather, the nonmovant must respond to the motion for summary judgment

by setting forth particular facts indicating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Celotex Corp.*, 477 U.S. at 322; Fed.R.Civ.P. 56(c).

III. Analysis

We are presented in the instant case with an opportunity to clarify the effect of the Supreme Court's opinion in *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502 (1997), on the Fifth Circuit's decision in *Hart v. O'Brien* 127 F.3d 424. Both courts apply a functional approach to absolute immunity. *See Hart*, 127 F.3d at 439 (holding that a prosecutor enjoys absolute immunity when he acts as an advocate for the state, but does not enjoy such immunity for acts of investigation or administration); *see also Kalina* 118 S.Ct. at 509 (emphasizing the functional approach to determining absolute immunity, and explaining that absolute immunity protects the prosecutor's role as an advocate[1]). The courts differ, however, as to their analysis of the threshold timing of prosecutorial absolute immunity.

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[1] The line between prosecutor as advocate and prosecutor as investigator, administrator, and/or complaining witness rests, in turn, in part on the policy interest in enabling [the prosecutor] to exercise independent judgment when 'deciding which suits to bring and in conducting them in court.'" *Id.* at 507 (quoting *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

In *Hart*, this court held that the earliest time that absolute immunity may attach to a prosecutor's activities is when charges are filed.[2] Shortly after this court's opinion in *Hart*, the Supreme Court decided *Kalina*. In *Kalina*, the Supreme Court found that a prosecutor has absolute immunity when acting as an advocate in supplying legal advice to support an affidavit for an arrest warrant,[3] unless that

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[2] In *Hart*, the Affidavit of Probable Cause supporting the arrest warrant contained two factual errors supplied by the prosecutor. This court stated that, "until charges have been filed against an individual, a prosecutor is not absolutely immune for cooperating with law enforcement officers in obtaining a search warrant against that person based on false information." *Id.* at 439.

[3] The Court concluded:

> These cases make it quite clear that petitioner's activities in connection with the preparation and filing of two of the three charging documents -- the information and the motion for an arrest warrant -- are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems quite clear that the preparation and filing of the third document in the package was part of the advocate's function as well. The critical question, however, is whether she was acting as a complaining witness rather than a lawyer when she executed the certification "[u]nder penalty of perjury."

Id. 118 S.Ct. at 508. Before coming to this conclusion, the Court noted that "her drafting of the certification, her determination that

prosecutor personally attests to the truth of the evidence presented to a judicial officer, or exercises judgment going to the truth or falsity of evidence.[4] *Hart* is in conflict with *Kalina*, because a prosecutor may select the facts to include in the certification prior to when charges are filed. The starting point must be earlier than the formal onset of judicial proceedings, at least encompassing preparatory moments.

Kalina now governs when absolute immunity may apply, thus the district court erred in applying *Hart*'s chronological analysis to the facts of the instant case. *Hart* is no longer valid law regarding the threshold timing for absolute immunity. The district court, however, expressly applied *Kalina* to the facts, deciding that the Assistant District Attorneys were not entitled to absolute immunity because they had manufactured evidence for the police to place in an affidavit for probable cause. Therefore, under *Kalina* the Assistant District Attorneys were acting not as advocates but

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the evidence was sufficiently strong to justify a probable cause finding, her decision to file charges, and her presentation of the information and motion to the court" could appropriately be characterized as the work of an advocate. *Id.* "Each of the matters involved the exercise of the professional judgment; indeed, even the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate." *Id.*

[4] The Court stated in reference to the immediately above-cited statement: "[T]hat judgment could not affect that truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness, not of the lawyer." *Id.* at 510.

as complaining witnesses. Pursuant to *Kalina*, this would be a legally correct conclusion. We must disagree, however, with the district court's factual conclusion.

The district court's finding under *Kalina* that the Assistant District Attorneys in the instant case acted as complaining witnesses rather than as advocates turned entirely on the finding of manufactured evidence. However, the facts do not support a finding of manufactured evidence, but instead a reasonable inference that an individual repeatedly photocopying other persons' licenses for the same small set of individuals, and selling them laminating paper, might know of the ultimate use and thus be charged as a principal in falsifying public records. The Assistant District Attorneys point to deposition testimony of one of the officers involved that a limited set of individuals -- two or three people -- were purchasing all the photocopies, bringing in three or four licenses at a time, all belonging to minors and all not belonging to the purchaser, to be copied by Spivey, and that their photocopy purchase included laminating paper. This evidence either contradicts or undermines the district court's finding that the prosecutors "[told] the officers to include certain facts (which, we note, did not even exist in reality or even in the minds of the Troopers) and swear to them . . ." and that "it was the ADA's who creatively 'filled in the gaps' in the evidence and decided a warrant could be gotten." Indeed, the district court stated, "[i]n doing so, the ADA's were not merely evaluating existing evidence and deciding what would best support an arrest warrant." On the basis of the above-stated facts, that conclusion is in error.

The prosecutors were not creating or manufacturing new facts for the police officers to include in an affidavit for

an arrest warrant, but suggesting legal conclusions on the facts already given to them by the police. Under *Kalina*, a prosecutor acts as an advocate in supplying legal advice to support an affidavit for an arrest warrant and is entitled to absolute immunity as long as a prosecutor does not personally attest to the truth of the evidence presented to a judicial officer, or exercise judgment going to the truth or falsity of evidence. Because the prosecutors were acting as advocates in supplying legal advice based on facts provided by police officers to support an affidavit for an arrest warrant, the prosecutors in the instant case are absolutely immune.

In conclusion, we hold, in light of the Supreme Court's decision in *Kalina,* that the district court erred by ruling that absolute immunity does not attach until charges have been filed. The district court also erred in finding that the prosecutors acted as complaining witnesses rather than advocates. Thus, the Appellants are entitled to absolute immunity for their role in providing legal advice based on facts provided to them by police officers in preparation of an arrest warrant. Accordingly, we REVERSE AND RENDER, dismissing Spivey's suit on the grounds of absolute immunity.

The two pending motions that were carried with the case are hereby denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

[Filed May 26, 1998]

No. 97-0876-A

CLARENCE WILLARD SPIVEY, JR., ET AL.,

v.

HAROLD S. COOK, ET AL.

JUDGE LITTLE
MAGISTRATE JUDGE KIRK

RULING

Before the court by referral is a motion to dismiss or for summary judgment filed by defendants Thomas Yeager ("Yeager"), Jerry Henderson ("Henderson"), and Charles F. Wagner ("Wagner"), all members or former members of the Rapides Parish District Attorney's office, against the plaintiffs. We have federal question jurisdiction over this civil rights action under 28 U.S.C. § 1331. For reasons discussed below, the motion for dismissal or summary judgment is **DENIED**.

I. Factual Background

The plaintiffs, Karon[1] and Willard Spivey, own Thrifty Instant Print ("Thrifty" or "the shop") on Masonic Drive in Alexandria, Louisiana. They offer a full service copy shop, including accurate, color reproductions. At times, minors have come into the shop to obtain color copies of their driver's licenses. The minors have told the Spiveys that the copies were needed for identification in college applications and other legitimate purposes.

Unbeknownst to the Spiveys, however, many of the minors who got color copies of their licenses at the shop used those copied to make fake IDs. The minors changed the date of birth on the copies to make themselves of legal age, and then laminated the altered copies over their existing licenses.

As part of a crackdown on underage drinking and patronage of bars during the high-school prom season, the Louisiana Department of Public Safety and Corrections seized several of the forged licenses at the Cotton Gin Bar and Grill, a pub that does not allow minors to enter. The minors were interviewed and, in their statements, told State Troopers Harold S. Cook ("Cook") and Rickey Robertson ("Robertson")[2] that the copies were obtained at Thrifty.

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[1] This is the correct spelling; Mrs. Spivey spells her first name with an "o" rather than an "e".

[2] Cook and Robertson are defendants in this case but are not party to this motion.

Between April 9th and April 11th, 1996, Cook and Robertson investigated the situation, and at one point went to Thrifty. In his deposition, Robertson stated that "[a]t the time we went to [Thrifty] [Mr. Spivey] was not a suspect. We just went on an informational gathering trip mostly to verify that he had a color copier, and he freely gave us information." Robertson Deposition at p. 21, lines 18-22. To that end, the *troopers* asked for a color copy of one of their licenses, which the Spiveys gave them. Cook and Robertson informed the Spiveys of the crackdown and requested that they not make any more color copies of drivers licenses for minors until further notice. The Spiveys complied with the request, and on April 12, 1996 contacted Cook and Robertson to let them know that a number of minors had been in the shop asking for copies of their licenses, and that the Spiveys had refused.

On April 15, 1996, Cook and Robertson went to the office of the District Attorney of Rapides Parish and met with Assistant District Attorneys ("ADAs") Thomas Yeager ("Yeager") and Jerry Henderson ("Henderson")[3] as well as a few other individuals. Prior to this meeting in the District Attorney's office, Cook and Robertson did not suspect Mr. Spivey of any wrongdoing and had no intentions of seeking a warrant for his arrest. At the meeting, however, ADAs Yeager and Henderson decided that the troopers could seek a warrant for Mr. Spivey's arrest for an alleged violation of La. Rev. Stat. 14:132 (injuring public records):

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[3] Yeager and Henderson, along with District Attorney Charles F. Wagner, are movants herein.

> Injuring public records is the intentional removal, mutilation, destruction, alteration, falsification, or concealment of any record, document, or other thing, filed or deposited, by authority of law, in any public office or with any public officer.

The ADAs told the troopers to include in their affidavit of probable cause the words "counterfeited" and "falsifying information," even though neither the troopers nor the ADAs had a scintilla of evidence that Mr. Spivey had done anything more than make the requested copies. No one alleges that the Spiveys actually altered the licenses themselves. Indeed, all evidence points to the conclusion that the Spiveys did not even know that the copies were being used to make fake Ids. The allegations that Mr. Spivey counterfeited or falsified the licenses himself stemmed directly from the ADAs, as evidenced by the following exchange in Cook's deposition:

> Q. And then after you met with members of the D.A.'s office they suggested that you put "counterfeited", in your Probable Cause Affidavit, you did and you went and got a warrant. Is that a fair statement of what happened?
>
> A. What happened? We went and seen Mr. Pete Terrell, he took us to Mr. Yeager, Mr. Yeager reviewed it all. Mr. Yeager sent us to Mr. Searcy, Mr. Henderson, with Mr. Terrell, they pulled the arrest law books out, they said, "Here's the charge we

> want. Here's what we want. Here's how we want it worded." Officer Robertson typed the warrant to their specs, they contacted Judge Donald Johnson, I believe it is, we went to see if he was in, we walked to that office, he reviewed it and signed the warrant. That's the nutshell.

Cook Deposition at p. 25, lines 8-23. This is confirmed in Robertson's deposition:

> Q. Who told you to put the word "counterfeited" up in that probable cause warrant?
>
> A. The people from the District Attorney's Office.
>
> Q. So did y'all ask them what you should use in the Probable Cause Affidavit?
>
> A. Yes, sir.
>
> Q. And they told you to use "counterfeited"?
>
> A. Yes, sir. I went along the guidelines that they said.

Robertson Deposition at p. 62, lines 10-12 and 25, p. 63, lines 1-5. Cook and Robertson did not exercise any independent judgment in seeking the warrant, nor did they

have any evidence tending to prove that Spivey knowingly aided the minors in altering their licenses.

After the meeting, Cook and Robertson swore out a Probable Cause Affidavit stating that "Clarence W. Spivey Jr., owner of Thrifty Instant Print located on Masonic Drive Alexandria La. copied and counterfeited Louisiana Drivers Licenses," and that he violated La. Rev. Stat. 14:132 "by copying and falsifying information." Arrest Warrant Clarence W. Spivey. Jr. (April 16, 1996) . Judge Johnson then signed the warrant for the arrest of Mr. Spivey and, with five state Police backup cars, Cook and Robertson arrested him during the afternoon of April 16, 1996. Members of the media were present at the arrest, and Spivey was taken out the front, rather than the back, of the shop.

Shortly after the arrest, all charges were dropped. Then-Assistant District Attorney Roger Breedlove said "I do not have any evidence that he committed any crime. . . . What he did was make copies of five driver's licenses, and it is not illegal to copy driver's licenses in Louisiana. Mr. Spivey made the copies without any knowledge of any illegal activity being connected with them. There is not one shred of evidence in our files that he has committed any wrongdoing whatsoever. . . ."

II. Plaintiff's Claims

Plaintiffs' suit includes claims under 42 U.S.C. § 1983 and common law negligence and defamation. Plaintiffs allege that the movants herein (i.e., the defendants from the District Attorney's office) intentionally and wilfully caused Troopers Cook and Robertson to embellish and falsify their probable

cause affidavit, which lead to an arrest warrant for Mr. Spivey being improperly issued, and thus to the damages occasioned on the plaintiffs.

III. Movant's Arguments

Movants contend that the ADAs (and consequently the DA) are entitled to absolute immunity from suits of any nature stemming from their activities in preparing documents in support of an arrest warrant. In the alternative, they contend that their activities are entitled to qualified immunity and, due to an alleged lack of evidence of malice in the record, there are no material questions of fact and they are entitled to summary judgment under Fed. R. Civ. P. 56(b). We discuss each argument and in turn, and for reasons discussed herein deny the motion on both grounds.

IV. Standards Under 12(b) (6) and 56(b)

When considering a motion to dismiss under Fed. R. Civ. P. 12(b) (6), the court is to accept the plaintiff's factual allegation as true. Buckley v. Fitzsimmons, 509 U.S. 259, 261, 113 S.Ct. 2606, 2609 (1993); Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th cir. 1995). The court cannot grant a 12(b) (6) motion to dismiss unless the facts as alleged indicate that the plaintiff has failed to state a claim upon which relief can be granted. Id. When determining whether relief can be granted based on the facts as alleged, the court does not look past the face of the pleadings, St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co., 937 F.2d 274, 279 (5th Cir. 1991), *cert. denied,* 502 U.S. 1030 (1992), and must construe all factual allegations in the light most

favorable to the plaintiffs, Rubinstein v. Collins, 20 F.3d 160, 166 (5th Cir. 1994).

A motion for summary judgment under Fed. R. Civ. P. 56 will be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 55(c). Where the moving party shows that "there is an absence of evidence to support the non-moving party's case," Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986), the non-moving party must then come forward with specific facts showing that there is a genuine factual issue for trial. Fed. R. Civ. P. 56(e). Should the non-moving party fail to so respond, summary judgment, if appropriate, shall be entered. Id. However, the judge is not to weigh the evidence at the summary judgment phase, but merely determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986). If a reasonable jury could return a verdict for the nonmoving party, summary judgment will not lie. Id. at 248, 106 S.Ct. at 2510.

V. Law and Analysis

A. Absolute Immunity

In their Amended Petition for Damages at p. 4 (Dec. 17, 1997), plaintiffs allege

> that they have now discovered that defendants, HAROLD S. COOK and RICKEY

> ROBERTSON were induced to manufacture and concoct false charges against petitioners by members of the Rapides Parish District Attorney's Office, namely, THOMAS YEAGER, JERRY HENDERSON, and CHARLES F. WAGNER.
>
> That these defendants, acting as Assistant District Attorney and agents for defendants, jointly, personally and on behalf of the District Attorney for the Parish of Rapides prepared an embellished and false affidavit for defendants, COOK and ROBERTSON to type and prepare and to submit to the district judge to obtain a warrant of arrest of petitioner, SPIVEY.

We do not find, after taking the above allegations as true, that movants are entitled to absolute immunity and either dismissal or summary judgment. Plaintiffs state a claim on the face of the pleadings and support that claim with competent evidence.

This case is governed squarely by the Fifth Circuit's recent decision in Hart v. O'Brien, 127 F.3d 424 (5th Cir. 1997), which has nearly identical facts as the case at bar. In Hart, the plaintiff was arrested and spent two weeks in jail for alleged possession of marijuana with intent to distribute. Id. at 432-34. The Affidavit of Probable Cause supporting the arrest warrant contained two factual errors supplied by the defendant prosecutor. Id. The charges were dropped two weeks later when the suspect was released on bond. Id. The suspect then brought an action against the police and the prosecutor under state law and § 1983 for malicious prosecution, constitutional violations, etc. Id. The

prosecutor filed a motion for summary judgment based on either absolute or qualified immunity. Id. at 434. The Fifth Circuit denied the motion with respect to absolute immunity because absolute immunity had not yet attached to the prosecutor's assisting the police with the Affidavit. Id. at 439. The court set the earliest time at which absolute immunity can attach to a prosecutor's activities: "[U]ntil charges have been filed against an individual, a prosecutor is not absolutely immune for cooperating with law enforcement officers in obtaining a search warrant against that person based on false information." Id. at 430. Under this standard, it is clear that the alleged conduct of the ADAs in drafting or otherwise influencing the drafting of a false Affidavit of Probable Cause against Spivey is not protected by absolute immunity.

Our denial of absolute immunity for the movants herein is further supported by the Supreme Court's recent decision in Kalina v. Fletcher, ___ U.S. ___, 118 S.Ct. 502 (1997). In Kalina, a prosecutor prepared the charging documents, including the Affidavit of Probable Cause, which she personally swore to, and presented the same to the judge to obtain a warrant. Id. at 505. The prosecutor's Affidavit contained two factual errors. Id. The warrant was obtained and the suspect was arrested. Id. However, when the errors in the Affidavit were discovered, the charges were dropped, and the suspect sued the prosecutor under § 1983. Id. The Supreme Court focused on the nature of the prosecutor's actions in determining what level of immunity applied to them. The Court held that absolute immunity applied to the preparation of the information and the motion for an arrest warrant, and the presentation of the same to the judge by the prosecutor, because these were done as an advocate for the

state; they required the prosecutor's professional judgment. Id. However, the prosecutor's preparation of and swearing to the Affidavit of Probable Cause was *not* done in her role as a lawyer/advocate, but simply as a complaining witness. Id. at 509-10. Swearing out the alleged facts underlying probable cause does not require professional judgment, and is thus not done in the role of advocate. Hence, since it was done as a complaining witness, the preparation of and swearing to the Affidavit of Probable Cause was protected by qualified, rather than absolute, immunity. Id. Thus, the key is whether the prosecutor is acting as an advocate or as an investigator or complaining witness during the pre-prosecution phase.

We find the ADAs' alleged embellishment and drafting of the Affidavit of Probable Cause analogous to that of the prosecutor's swearing to misrepresented facts in the Affidavit that she drafted in Kalina. The mere fact that the ADAs here did not personally sign the Affidavit of Probable Cause does not make them any less of a complaining witness than the prosecutor in Kalina who did sign the Affidavit. *See* Hart, 127 F.3d at 448-49; *cf.* Franks v. Delaware, 438 U.S. 154, 164 n.6, 98 S.Ct. 2674, 2680 (1978) (holding that "police [can] not insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity"). Thus, regardless of who signed the Affidavit, by telling the officers to include certain facts (which, we note, did not even exist in reality or even in the minds of the Troopers) and swear to them, the ADAs are acting more like the attorney-as-complaining-witness in Kalina than the attorney-as-advocate in Kalina.

This is admittedly a shady area of jurisprudence, so we expound upon our analysis to clarify our holding. Spivey

could be guilty of injuring public documents by either altering them himself or intentionally aiding another to do so. Thus, to swear out a warrant for arrest based on such a charge, some evidence had to exist at that time which could prove either the act or the intent to facilitate the act. However, Troopers Cook and Robertson admitted that, prior to their meeting with the ADAs, they had no intention of charging Mr. Spivey with any crime, and in fact did not even suspect him of any wrongdoing. Instead, it was the ADAs who creatively "filled in the gaps" in the evidence and decided a warrant could be gotten. In so doing, the ADAs were not merely evaluating existing evidence and deciding what would best support an arrest warrant. That arguably would have put them in the lawyer-as-advocate category under Kalina, and thus their actions would be protected by absolute immunity.

On the contrary, plaintiffs allege that the ADAs manufactured evidence which, as admitted by ADA Breedlove, simply did not exist. "Mr. Spivey made the copies without any knowledge of any illegal activity being connected with them," said Breedlove. "There is not one shred of evidence in our files that he has committed any wrongdoing whatsoever. . . ." Thus, without even a "shred of evidence," the ADAs were acting as investigators by supplying evidence on their own. Whether he goes out into the field and obtains actual evidence through interviews and investigation, or whether he simply fabricates the evidence, the prosecutor is acting as an witness/investigator and not as a lawyer/advocate.

We simply cannot say that a prosecutor who makes up evidence for an Affidavit is acting as an advocate. *See* Buckley v. Fitzsimmons, 509 U.S. 259, , 113 S.Ct. 2606,

2616 (1993) (holding that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested"). There is no reason why the conduct of supplying facts for an Affidavit, which yielded only qualified immunity in Kalina, should be cleansed and veiled by absolute immunity merely because it is run verbatim through the officers and sworn to by them rather than the ADAs. *See* Hart, 127 F.3d at 448-49. We refer again to the Supreme Court's analysis in Burns, where the Court found it "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." Burns, 500 U.S. at 494-95, 111 S.Ct. at 1944. The motion to dismiss or for summary judgment based on absolute immunity is therefore **DENIED**.

B. Qualified Immunity

Movants argue in the alternative that their actions are covered by qualified immunity and/or that they should receive summary judgment on the theory that plaintiffs have failed to introduce any evidence of malice, which is required to maintain their action. However, we find that there are genuine questions of material fact regarding both qualified immunity and the presence of malice on the part of the ADAs in causing the Troopers to include untruths in their Affidavit of Probable Cause.

Qualified immunity is waived when a defendant violates clearly established statutory or constitutional rights. Hart, 127 F.3d at 439. It is an axiomatic and obvious principal that a government defendant who knowingly causes an arrest without probable cause violates the arrestee's Fourth

Amendment rights. "A governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a warrant, *regardless* of whether he signs the affidavit." Id. at 448-49 (emphasis added). Thus, we are left with the question of whether or not the ADAs intentionally or recklessly included the false information in the Affidavit supporting the warrant for Spivey's arrest. ADA Breedlove admitted shortly after Spivey's arrest that there was "not a shred" of evidence to support the allegations against him. No matter what conjecture the ADAs may have had about Spivey's guilt, they had absolutely *no* evidence to support their "hunch." The Troopers did not tell them that Spivey had himself falsified the driver's licenses. All they knew was that Spivey. had made the copies, and that does not equate to the allegation that he falsified or counterfeited them. Thus, there remains a genuine issue of material fact as to whether movants herein intentionally or recklessly caused the Troopers to submit to the district judge a false Affidavit of Probable Cause.

Addressing, movants' other contention, the presence of malice is a question of fact, and can be inferred from the lack of probable cause. Miller v. East Baton Rouge Parish Sheriff's Dept., 511 So. 2d 446, 453 (La. 1987). It may be found when an unsupported arrest is used "as an experiment to discover who might have committed the crime." Id. Here, a reasonable jury could infer that the defendants knew or should have known that they had no probable cause, and that they caused the arrest of Mr. Spivey in the hopes of shaking a confession out of him or of somehow gaining the missing piece of the puzzle (i.e., intent to facilitate injury to public records).

Moreover, the timing of Spivey's arrest makes the presence of malice more likely. The crackdown on underage drinking occurred simultaneously with the high-school prom season. A reasonable jury could find malice where defendants caused Spivey's arrest, knowing that they did not have probable cause, as a bit of public grandstanding to show how tough the District Attorney was on underage drinking. We note with great import the presence of the media at Spivey's arrest, and that he was taken out the front, rather than the rear, of his shop in, handcuffs, in front of the media, and with five State Police backup cars present. Obviously someone on the inside tipped off the media. Moreover, we wonder, why did the defendants need *five* State Police squad cars to arrest a man charged with making false driver's licenses? It must have painted a pretty picture in the media. Unfortunately, that came at the expense of an innocent man.

The Motion for Summary Judgment based on qualified immunity and lack of malice is therefore **DENIED**. Alexandria, Louisiana this 21st day of May, 1998.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-30595

[Filed January 10, 2000]

Clarence Willard Spivey, Jr., doing business as Thrifty Instant Print; Karon K. Spivey, doing business as Thrifty Instant Print,	)
Plaintiffs-Appellees,	)
v.	)
Rickey Robertson, individually and in his official capacity as a police officer for the State of Louisiana; et al,	)
Defendants,	)
Charles F. Wagner; Thomas Yeager; Jerry Henderson,	)
Defendants-Appellants.	)

Appeal from the United States District Court
for the Western District of Louisiana
Alexandria

ORDER
ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

It is ORDERED that appellees' motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge